Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

NO. _____ 79-2019

ROBERT E. KELLER, individually and as District Attorney for the Clayton Judicial Circuit, State of Georgia,

Petitioner,

v.

SEPTUM, INC., A Georgia Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes and federal rules involved	3
Statement	5
Reasons for granting the writ	9
Conclusion	19
Certificate of service	20
Appendix	A-1

CITATIONS

Cases	ii
Statutes	ii
Miscellaneous	iv

TABLE OF AUTHORITIES

Statutes

	Page
Ga. Code Ann. Section 26-2101	2, 3, 6
Federal Declaratory Judgment Act, 48 Stat. 955, 28 U.S.C. 2201	3, 13
Rule 57 Federal Rules of Civil Procedure	3, 13
42 U.S.C. Section 1983	6, 7
28 U.S.C. 1254 (1)	2

Cases

Aetna Casualty and Surety Co. v. Quarles, 92 F.2d 321 (1937)	14, 15
Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 65 S.Ct. 1384, 89 L.Ed. 1725	15
American Automobiles Ins. Co. v. Freundt, 103 F.2d. 613, 51 Yale L.J. 511	15
Bantam Books v. Sullivan, 372 U.S. 58, 9 L.Ed.2d 584 (1963)	16
Becker v. Thompson, 459 F.2d 919 (1972)	9
Borchard, *Declaratory Judgments* (2d.ed. 1941)	14, 17
Boyce Motor Lines v. United States, 342 U.S. 337, 72 S.Ct. 329, 96 L.Ed. 367	19
Brillhart v. Excess Ins. Co., 316 U.S. 491, 494, 62 S.Ct. 1173, 86 L.Ed. 1620	15
Cunningham Bros. v. Bail, 407 F.2d 1165; Cert. denied 395 U.S. 959, 89 S.Ct. 2100, 23 L.Ed.2d 745	17
Eccles v. Peoples Bank, 333 U.S. 426, 68 S.Ct. 641, 92 L.Ed. 784	15

TABLE OF AUTHORITIES (Continued)

Page

Cases (Continued)

Fireman's Ins. Co. v. Newark, N. J. v. Riley, 322 F.Supp. 349 17

Great Lakes Co. v. Huffman, 319 U.S. 293, 63 S.Ct. 1070, 87 L.Ed. 1407 15

Independent Tape Merchants Ass'n v. Creamer, 346 F.Supp. 456 17

Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co., 342 U.S. 180, 72 S.Ct. 219, 96 L.Ed. 200 17

Maryland Casualty Co. v. Consumers Finance Service, 101 F.2d 514 15

Miller v. California, 413 U.S. 15 18

Provident Tradesmen's Bank and Trust Co. v. Patterson, 390 U.S. 102, 88 S.Ct. 733, 19 L.Ed. 936 ..... 15, 16

Public Service Commission of Utah v. Wycoff Co., 344 U.S. 237, 73 S.Ct. 236, 97 L.Ed. 291 15

Russian Commercial Industrial Bank v. British Bank, 90 L.J.K.B.N.S. 1089; 19 A.L.R. 1101 14

Samuels v. Mackell, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971) 8, 10

Steffel v. Thompson, 415 U.S. 451, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974) 2, 8, 9, 11

Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) 8, 10

Zemel v. Rusk, 381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed.2d 179 15

TABLE OF AUTHORITIES (Continued)

Page

Miscellaneous

Brochard, Declaratory Judgments (2d.Ed. 1941) 14, 17

6A Moore's Federal Practice 17

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SEPTUM, INC., a Georgia Corporation,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on March 24, 1980.

OPINIONS BELOW

The opinions of the District for the Northern District of Georgia are not reported, but copies thereof are included herein at appendix. The opinion of the Court of Appeals for the Fifth Circuit is reported at *614 F.2d 456 (1980)*.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on March 24, 1980, and copies thereof are appended to this petition in the Appendix at page A-1. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The United States District Court for the Northern District of Georgia declined to accept jurisdiction over respondent's action for declaratory and injunctive relief in which respondent sought a declaration that a movie exhibited at its Clayton County theatre was not obscene under *Georgia Code Ann.* Section 26-2101. No attack was made on the facial validity of Georgia's obscenity statute. After months of communication with the County, respondent extracted an agreement from petitioner to give advance warning prior to taking prosecutorial action. Upon receiving such notice from petitioner, respondent filed its action for declaratory and injunctive relief in the federal court. The Fifth Circuit Court of Appeals reversed the District Court's declination to accept jurisdiction. The questions presented are:

1. Whether *Steffel v. Thompson*, 415 U.S. 451, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974), requires Federal District Courts to entertain any and every action filed by motion picture theatre owners for a declaratory judgment that a particular movie desired to be shown is not obscene, applying the standards of a facially valid State statute, when a State prosecution has been threatened but is not pending, and a showing of bad faith enforcement or other special circumstances has not been made.

2. Whether Federal District Courts may, considering

the nature of the case, all circumstances regarding how it arose, the presence or absence of constitutional issues, and the availability of another forum equally or better suited for determining the factual issue of obscenity vel non, exercise judicial discretion and decline to grant federal declaratory relief in such cases.

STATUTES AND FEDERAL RULES INVOLVED

Federal Declaratory Judgment Act, 48 Stat. 955 as amended, 28 U.S.C. Section 2201:

> "In a case of actual controversy within its jurisdiction, except with respect to Federal Taxes, other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of Title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

Rule 57 of the Federal Rules of Civil Procedure:

> "Rule 57. Declaratory Judgments. The procedure for obtaining a declaratory judgment pursuant to Title 28, U.S.C. Section 2201, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar."

Ga. Code Ann. Section 26-2101, Georgia Acts 1975, p. 498:

> "(a) A person commits the offense of distributing

obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or offers to do so, or possesses such material with the intent to do so, provided that the word 'knowing' as used herein, shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter, and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material. Provided, however, the character and reputation of the individual charged with an offense under this law, and if a commercial dissemination of obscene material is involved, the character and reputation of the business establishment involved may be placed in evidence by the defendant on the question of intent to violate this law. Undeveloped photographs, molds, printing plates and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

(b) Material is obscene if:

(1) to the average person, applying contemporary commuity standards, taken as a whole, it predominantly appeals to the prudient interest, that is a shameful or morbid interest in nudity, sex or excretion;

(2) the material taken as a whole, lacks serious literary, artistic, political or scientific value, and

(3) the material depicts or describes, in a patently offensive way, sexual conduct specifically defined in subparagraphs (i) through (v) below

(i) acts of secual intercourse, heterosexual or homosexual, normal or perverted, actual or simulated;

(ii) acts of masturbation;

(iii) acts involving excretory functions or lewd exhibition of the genitals;

(iv) acts of bestiality or the fondling of sex organs of animals;

(v) sexual acts of flagellation, torture or other violence indicating a sadomasochistic sexual relationship;

(c) Additionally, any device designed or marketed as useful primarily for the stimulation of human genital organs in obscene material under this section.

(d) Material, not otherwise obscene, may be obscene under this section if the distribution thereof, or the offer to do so, or the possession with intent to do so is a commercial exploitation of erotica solely for the sake of prurient appeal.

(e) It is an affirmative defense under this section that dissemination of the material was restricted to:

(1) a person associated with an institution of higher learning, either as a member of the faculty or a matriculated student, teaching or pursuing a course of study related to such material; or

(2) a person whose receipt of such material was authorized in writing by a licensed medical practitioner or psychiatrist.

A person convicted of distributing obscene material shall be punished as for a misdemeanor of a high and aggravated nature."

STATEMENT

This action was brought in the United States District Court for the Northern District of Georgia by Septum, Inc. (Septum), a Georgia corporation engaged in the business of exhibiting motion pictures, against Robert E.

Keller individually and as District Attorney for Clayton County in the State of Georgia (the County). Septum sought injunctive and declaratory relief from the County's threatened enforcement of the Georgia Obscenity Statute, *Ga. Code Ann.* Section 26-2101, claiming that enforcement of the statute against it infringed upon rights secured to it under the first amendment, in violation of 42 U.S.C. 1983 (1976). The basis for the threated prosecution was Septum's exhibition of an x-rated motion picture entitled "Cinderella", a film based loosely on the well-known fairy tale, and incorporating repeated episodes of sexually explicit conduct.

The events leading up to this litigation are as follows: Since the fall of 1975, Robert E. Busman, President and sole owner of Septum, had initiated and actively pursued negotiations with the County regarding the exhibition of x-rated films. Septum wished to avoid the arrest of its employees for showing films which the County believed to be obscene. In March, 1977 Septum entered into an informal arrangement with the County regarding future exhibition of such films. The County agreed to issue a warning to Septum in the event it intended to proceed with obscenity arrests and prosecutions against Septum because of an allegedly obscene movie. This agreement was carried out, and was effective in September 1977 when the present action was filed by Septum.

Septum had been showing the movie "Cinderella" at the Old Dixie theatre in Clayton County since August 26, 1977, and the District Attorney had received over 200 phone calls complaining about it. The District Attorney determined that he would view the movie to determine whether a criminal prosecution should be initiated. Thereafter, at Septum's request, a conference was held

between Mr. Busman and his attorneys, and members of the District Attorney's office on September 6, 1977. At that time, the District Attorney informed Septum's representatives that if Septum continued to show the movie, he would initiate criminal prosecution. At the request of Septum's attorney, and for reasons soon to become apparent, the District Attorney prepared a letter containing substantially the same statement of intent as had previously been conveyed. Septum stopped showing the film, and on September 7, 1977 filed this suit in federal district court.

The district court dismissed Septum's action, concluding that the conduct of Septum vis-a-vis the County resulted in a waiver of their right to relief under 42 U.S.C. Section 1983:

> "This court holds that where the circumstances demonstrate that a potential criminal defendant has voluntarily entered into and obtained an agreement with prosecuting authorities under which the authorities promise not to prosecute under the obscenity laws prior to notification of an intent to do so, such a criminal defendant, by engaging in a collusory relationship with the prosecutors, in effect waives the right to declaratory relief through an action under section 1983, based on prior restraint under color of the obscenity statute. If this court were to hold otherwise, by finessing such promises from state prosecutors, potential criminal defendants, without ever risking prosecution, would be assured of a federal 'advisory opinion' every time the state prosecutors gave notice of their intent to prosecute, and the doors to the federal courthouse would be open to countless numbers of section 1983 actions challenging application of state obscenity statutes to conceivably, every new film or magazine that is suspect. The federal courts were not designed to operate as a national censorship board."

The Fifth Circuit Court of Appeals, in an opinion written by Judge Randall with Judge Hill specially concurring, reversed the judgment of the District Court.

Judge Brown concurred in part and dissented in part.

Judge Randall found the salient facts and circumstances of the case sub judice to be indistinguishable from those in *Steffel v. Thompson*, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974). She stated at page 461 of the opinion:

> "Moreover, allowing the district court to abstain from exercising jurisdiction over this case would do violence to the Supreme Court's holding in *Steffel*. Concerning the applicability of *Steffel*, the district court quoted the following language from that case: ' . . . federal declaratory relief is not precluded when no state prosecution is pending and a federal plaintiff demonstrates a genuine threat of enforcement of a disputed state criminal statute, whether an attack is made on the constitutionality of the statute on its face or as applied.' 415 U.S. at 475, 94 S.Ct. at 1223-1224. The court reasoned that althought federal declaratory relief is not *precluded*, neither is a federal forum for the complaint *required*. This was error. In *Steffel* the Supreme Court reversed the Fifth Circuit's determination that abstention was proper under the principles announced in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed2d 669 (1971) and in *Samuels v. Mackell*, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971), and remanded. Plainly the disposition of that case precludes discretionary abstention in this one, since there is no factual distinction between the cases relevant to the abstention issue.
>
> Accordingly, we hold that abstention is inappropriate in this case."

REASONS FOR GRANTING THE WRIT

1.

The Court below erroneously interpreted *Steffel v. Thompson*, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974), based, apparently, upon a fundamental misunderstanding of the issue faced by the Supreme Court in that case. Judge Randall's statement below that "In *Steffel* the Supreme Court reversed the Fifth Circuit's determination that abstention was *proper* under the principles announced in *Younger* and in *Samuels v. Mackell* (cite), and remanded," misses the critical point of the *Younger*, *Samuels* and *Steffel* progression. The Fifth Circuit in the case sub judice treated *Steffel* as if it stood for the singular proposition that the Federal courts are *required* to entertain *all* declaratory judgment actions filed by plaintiffs against whom state prosecution has been threatened but is not pending. Such a treatment of *Steffel* not only ignores the true issue of that case, but in so doing it has the drastic and unprecedented effect of setting the Federal District Courts up as nothing less than what Judge O'Kelley of the Northern District of Georgia described as a "national censorship board."

In order to put *Steffel* in its proper context, one need only refer to the opinion rendered by the Fifth Circuit Court of Appeals in that case, *Becker v. Thompson*, 459 F.2d 919 (1972). Steffel and Becker desired to handout anti-war material on the premises of a Georgia shopping center. They were told by mall officials and police officers that their failure to leave would result in their arrest. Becker continued handbilling and was arrested for the offense of criminal trespass, *Georgia Code Ann.* Section 26-1503. Steffel left to avoid arrest. The district court denied Becker's prayer for injunctive relief on the basis

of *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and for declaratory relief on the basis of *Samuels v. Mackell*, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971) because of the pending state criminal prosecution against her. The district court also denied both injunctive and declaratory relief sought by Steffel, against whom no state criminal prosecution was pending. The court held that the "bad faith harassment" test set up in the *Samuels* case, supra, governing the propriety of declaratory relief when a state prosecution was pending, must also be met for declaratory relief when no state prosecution is pending. That is, the district court held that since there was no showing of bad faith harassment against Steffel by state authorities, federal declaratory relief was *precluded*.

The Fifth Circuit picked up on the district court's reasoning and affirmed. First, the Court noted that

> "*Younger*, supra, made it clear beyond peradventure that irreparable injury must be measured by bad faith harassment and such test must be applied to a request for injunctive relief against threatened state court criminal prosecution." 458 F.2d 922.

Then the Court demonstrated the similarity of effects caused by injunctive and declaratory relief and came to the following conclusion:

> "If the practical effects of injunctive and declaratory judgment remedies are identical because they result in the disruption of a state's enforcement of its criminal statutes when a criminal prosecution is pending, and therefore bad faith harassment must be shown before either remedy may issue, and if, as we have seen, the same test of bad faith harassment is prerequisite to injunctive relief in a threatened criminal prosecution, it follows that a like showing must be made for declaratory relief in a threatened prosecu-

> tion. In short, the reasoning in *Younger* would appear to ignore any distinction between pending and threatened proceedings, and make denial of federal relief *obligatory* in both situations unless bad faith enforcement can be shown." 459 F.2d 911.

The Court therefore held,

> "If the propriety of declaratory and injunctive relief should be judged by essentially the same standards, then in preprosecution cases there *must* be a showing of bad faith harassment for the granting of declaratory as well as injunctive relief. We conclude that under the circumstances of this case, even though no state prosecution was pending against Steffel, *since there was no showing of bad faith harassment, he was not entitled to a declaratory judgment.*" 459 F.2d 923.

Of course, the Supreme Court did not agree with the Fifth Circuit's conclusion that bad faith harassment must be shown before preprosecution declaratory relief can be granted. *Steffel v. Thompson,* 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505. But the issue remained the same, i.e. whether declaratory relief was *precluded* when there was no bad faith harassment demonstrated. It was certainly not expanded to the point desired by respondent herein, or suggested by Judge Randall below, that federal declaratory relief is *required* absent a pending state prosecution.

Justice Brennan's statement in the Court's opinion, that,

> "We therefore hold that regardless of whether injunctive relief may be appropriate, federal declaratory relief is not *precluded* when no state prosecution is pending . . ." 415 U.S. 475, 39 L.Ed.2d 524,

was not a flippant, irrelevant choice of words, but rather was directly responsive to the Fifth Circuit's holding that such relief indeed *was absolutely precluded* absent bad faith harassment.

The opinion of the Fifth Circuit Court of Appeals in the case sub judice went beyond the limited context of the *Steffel* opinion. Judge Randall noted that the District Court quoted *Steffel* to the effect that federal declaratory relief is not precluded when no state prosecution is pending. She then observed that:

> "Moreover, allowing the district court to abstain from exercising jurisdiction over this case would do violence to the Supreme Court's holding in *Steffel*.
>
> "The court reasoned that although federal declaratory relief is not precluded, neither is a federal forum for the complaint required. This was error. Plainly the disposition of *Steffel* precludes discretionary abstention in this one, since there is no factual distinction between the cases relevant to the abstention issue."

While there is more to be said herein regarding the factual distinctions between this case and *Steffel*, it is certainly clear that if Judge Randall's opinion is allowed to stand, litigants in the Fifth Circuit will be led to the erroneous conclusion that *Steffel* holds that if there is no pending state prosecution, then federal district courts *must* hear every declaratory judgment action that comes along. The district courts will serve at the beck and call of every adult magazine publisher and film distributor who wants an authoritative factual predetermination that his product is not obscene.

Steffel certainly does not require such a result, and this court should make that point clear by reversing the erroneous implication provided by the Fifth Circuit's opinion in this case.

2.

The fact that *Steffel* does not *require* the district courts to entertain all preprosecution declaratory actions is

highlighted by the discretionary nature of the remedy under the federal Declaratory Judgment Act, 48 Stat. 955 as amended, 28 U.S.C. Section 2201. The intervention sought by Septum in this case involves a type of decision making for which the declaratory judgment is ill suited and with which federal judges should not be irrevocably saddled.

In the case sub judice, respondent has asked for a declaratory judgment that Georgia's obscenity statute is unconstitutional as applied. In reality, this is nothing more than an attempt to add constitutional dignity to its root desire to have a federal court rule that the motion picture "Cinderella" does not violate Georgia's obscenity statute. To say that what respondent seeks reaches constitutional dimensions is sheer sophistry. The issue is purely factual:

Does "Cinderella" fall within the prescription of Georgia's Obscenity Statute or does it not? It is obscene or isn't it?

This is not to deny the existence of serious first amendment issues in the area of obscenity law. It is simply to suggest that in the context of determining whether or not a particular movie is obscene, under a facially valid statute, the issue is purely factual and properly assignable to someone other than a federal judge for declaratory relief.

Under the circumstances of this case, such assignment was proper by the district court and entirely consistent with the discretionary nature of the Declaratory Judgment Act.

Rule 57 of the Federal Rules of Civil Procedure expressly provides that the existence of another adequate remedy does not preclude judgment for declaratory

elief in cases where it is appropriate. Thus the courts have the *power* to grant declaratory relief despite the existence of another adequate remedy, but this does not mean that the courts are *required* to grant relief in all such cases. The negative form of the statement in Rule 57 leaves the matter to sound judicial discretion. Section 6 of the Uniform Declaratory Judgment Act provides:

> "The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainity or controversy giving rise to the proceeding."

Although the federal act contains no such express authorization for the exercise of judicial discretion in the grant or denial of declaratory relief, it, however, originally provided that the court "shall have power" to declare, and after the 1948 revision, now provides that the court "may" declare the rights and other legal relations of any interested party seeking such declaration. This is inferential authority for the exercise of judicial discretion.

An excellent summary of the discretionary nature of the action was made by Judge Parker of the Fourth Circuit in *Aetna Casualty and Surety Co. v. Quarles*, 92 F.2d 321 (1937):

> "The Uniform Declaratory Judgment Act expressly provides for the exercise of discretion as does the New York Civil Practice Act and the rules adopted thereunder. And the rule is well settled under the English statute and court rules that the granting of declaratory relief is a matter resting in the court's discretion. *Russian Commercial Industrial Bank v. British Bank*, 90 L.J.K.B.N.S. 1089; 19 A.L.R. 1101. Professor Borchard points out that these statutory provisions 'merely embody the established Anglo-American practice in all jurisdictions.' Declaratory

> Judgments, p. 100. While the federal act does not expressly provide that the granting of declaratory relief shall rest in the court's discretion, this is clearly implied from the fact that it merely gives the court power to grant the remedy without prescribing any of the conditions under which it is to be granted, and it is hardly to be supposed that it was intended that it should be granted as of course in every case where a controversy exists. The Report of the Judiciary Committee of the Senate states that there is a discretion under the statute 'not to issue the judgment if it will not finally settle the rights of the parties.' "

The discretionary nature of the declaratory judgment is clearly shown by holdings of the Supreme Court. In *Brillhart v. Excess Ins. Co.*, 316 U.S. 491, 494, 62 S.Ct. 1173, 86 L.Ed. 1620, Justice Frankfurter stated:

> "Although the District Court had jurisdiction of the suit under the Federal Declaratory Judgment Act, it was under no compulsion to exercise that jurisdiction. The petitioner's motion to dismiss the bill was addressed to the discretion of the court."

The Court cited as authority for this discretionary nature of the declaratory judgment *Aetna Casualty Co. v. Quarles*, 92 F.2d 321; *Maryland Casualty Co. v. Consumers Finance Service*, 101 F.2d 514; *American Automobiles Ins. Co. v. Freundt*, 103 F.2d 613 and 51 Yale L.J. 511. Subsequent decisions of the Supreme Court have also held the exercise of the power to grant declaratory judgments to be discretionary, e.g. *Great Lakes Co. v. Huffman*, 319 U.S. 293, 63 S.Ct. 1070, 87 L.Ed. 1407; *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 65 S.Ct. 1384, 89 L.Ed. 1725; *Eccles v. Peoples Bank*, 333 U.S. 426, 68 S.Ct. 641, 92 L.Ed. 784; *Public Service Commission of Utah v. Wycoff Co.*, 344 U.S. 237, 73 S.Ct. 236, 97 L.Ed. 291; *Zemel v. Rusk*, 381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed.2d 179; *Provident*

Tradesmen's Bank and Trust Co. v. Patterson, 390 U.S. 102, 88 S.Ct. 733, 19 L.Ed.2d 936.

Since Rule 57 authorizes declaratory relief "in cases where it is appropriate," there are, by implication, cases which are inappropriate for such relief, notwithstanding the courts power to provide it. The case sub judice is one type case in which federal declaratory relief is "inappropriate."

It is inappropriate, first, because of the procedural charade by which federal jurisdiction was invoked. After months of dealings between Septum and the Clayton County District Attorney's office, wherein Septum was the beneficiary of the County's promise to notify Septum of any intention to prosecute prior to arrest, Septum began showing the movie Cinderella. The District Attorney's office received two hundred calls complaining about the movie. The County contacted Septum and advised it that appropriate action would be taken. Septum's owner and attorneys seized upon the opportunity to take advantage of the County's wholly gratuitous gesture of preprosecution notice, requested that the notice be put in writing, and upon receiving it, raced to the federal courthouse seeking injunctive and declaratory relief. The violation of Georgia's obscenity statute, if any, had already occurred, yet the County could not prosecute without subjecting itself to allegations of a bad faith breach of its agreement with Septum. The County had tried to do that which the Supreme Court had encouraged it to do, e.g. *Bantam Books v. Sullivan*, 372 U.S. 58, 9 L.Ed.2d 584 (1963). However, all it got as a result was the opportunity to have the normal flow of Georgia's criminal procedure interrupted and substituted by a federal declaratory action. The scenario is very similar to

the spoiled child who, when faced by a situtation among his peers not to his liking, runs to mama asking her to tell those bad boys that they were wrong. Of course, the prudent mother, well aware that her son must deal with his peers from now on, and that her intervention would solve nothing sends her child back to deal with the problem in the most direct and meaningful way possible.

That is precisely what the district court did in this case. Rather than dignifying the obvious manipulation by way of procedural fencing for the *sole* purpose of forum shopping, Judge O'Kelley recognized and ruled that this matter was inappropriate for federal declaratory relief.

The court's discretion to decline to entertain a declaratory action should be invoked when the action would not "settle the controversy", or not serve a useful purpose in claryifying the legal relations in issue. *Borchard, Declaratory Judgments* (2d ed. 1941) 293. Courts should attempt to prevent the perversion of the Act to purposes not intended by the statute, and therefore should not permit the declaratory remedy to be used merely for the purpose of procedural fencing, or to provide an arena for a race for res judicata. *6A Moore's Federal Practice* 57.08(2), 57.08(5), citing *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 72 S.Ct. 219, 96 L.Ed. 200 (1952), *Cunningham Bros. v. Bail*, 407 F.2d 1165, cert. denied 395 U.S. 959, 89 S.Ct. 2100, 23 L.Ed.2d 745, *Independent Tape Merchants Ass'n v. Creamer*, 346 F.Supp. 456; *Fireman's Ins. Co. v. Newark, N.J. v. Riley*, 322 F.Supp. 349.

It is inappropriate, second, because of the nature of the inquiry and the future effects of accepting such cases. This case arises from an entirely different set of legal issues from those involved in *Steffel v. Thompson*, supra. In

Steffel the question was whether or not his conduct, i.e. handing out anti-war material at a shopping center, was constitutionally protected first amendment activity which Georgia's criminal trespass statute could not abrogate. Steffel's right to make *a comment* is per se protected by the first amendment in the same way that Septum's right to exhibit motion pictures, per se, is protected. In *Steffel*, state authorities were attempting to curtail Steffel's right to make a comment irrespective of its content. In the context of a time when our country was literally torn apart over the propriety of its involvement in the Viet Nam war, the State's enforcement of the criminal trespass statute against Steffel took on monumental constitutional proportions. The only way in which *Steffel* would have approximated the case sub judice would have been if he was trying to distribute sexually explicit materials. In that case, the right to make a comment would not be at issue, but rather whether the content of the comment violated Georgia's obscenity law. Clearly, such a purely factual determination falls short of the momentous constitutional issue involved in *Steffel*.

Miller v. California, 413 U.S. 15, after which Georgia's obscenity statute is patterned, established the criteria for determining whether or not material is obscene, and required that that determination be made by applying "community standards." The district court in this case recognized that that determination can be accomplished just as well, if not better, by local state proceedings. In short, he reached the altogether reasonable conclusion that there is simply no sound reason for the federal courts to become "national consorship boards" if the federal plaintiff has another forum in which that purely factual determination can be made.

Certainly Septum doesn't relish criminal prosecution.

But as noted in *Boyce Motor Lines v. United States*, 342 U.S. 337, 72 S.Ct. 329, 96 L.Ed. 367,

> "It is not unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line."

But for Petitioner's unwillingness to breach its agreement with Septum, there most definitely would have been a state forum immediately available for determining the obscenity vel non issue. To be sure, those in the position of Septum will have that forum in the future in Clayton County.

For all of the foregoing reasons, the district court acted appropriately in dismissing Septum's action for declaratory relief. This court should reverse the Fifth Circuit's determination in this case in order to be consistent with the purpose of the Declaratory Judgment Act and to insure that the Federal District Courts will not be inundated with requests for advisory opinions regarding the possible obscenity of each monthly girly magazine and each weekly motion picture. The Federal District Courts need to know if that is their job. This case is an appropriate vehicle for informing them one way or the other, and therefore the Court should exercise its discretionary jurisdiction.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

HAROLD G. BENEFIELD
Attorney for Petitioner

CLIFFORD A. STICHER
Attorney for Petitioner

CERTIFICATE OF SERVICE

We, Harold G. Benefield, and Clifford A. Sticher, Petitioner Attorneys, hereby certify that we have mailed a copy of the foregoing Petition for Writ of Certiorari to Mr. Foy Devine, Attorney for Respondent, 3565 Piedmont Road, N. E., Atlanta, Georgia, by placing a copy of same along with certificate attached thereto in a properly addessed and stamped envelope and mailed on the 19th day of June, 1980, and we did also mail a copy of same to Honorable Arthur K. Bolton, Attorney General of Georgia, 321 Judicial Building, Atlanta, Georgia.

HAROLD G. BENEFIELD
Attorney for Petitioner

CLIFFORD A. STICHER
Attorney for Petitioner

Appendices

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

SEPTUM, INC., a Georgia corporation

vs.

ROBERT E. KELLER, Individually and as District Attorney for Clayton County, State of Georgia

CIVIL NO: C77-1476A

ORDER

This action for declaratory[1] and injunctive[2] relief arises from plaintiff Septum, Inc.'s (hereinafter "Septum") exhibition of the X-rated movie "Cinderella-96" at the Old Dixie Theater in Clayton County, Georgia. In response to certain complaints about the offensive nature of the film, staff members of the District Attorney's office in Clayton County viewed the movie and determined that there was sufficient probable cause that it violated the Georgia obscenity statute.[3] Accordingly, after the movie

[1] Plaintiff is seeking an order declaring (1) that *Ga. Code Ann.* §*26-101* as applied to plaintiff by defendant is an unconstitutional violation of its first and fourteenth amendment rights and (2) that the movie "Cinderella-96" is not obscene within the meaning of either the decision of the United States Supreme Court in *Miller v. California*, 413 U.S. 15 (1973), or *Ga. Code Ann.* §*26-2101*.

[2] Plaintiff is seeking both a preliminary and a permanent injunction, enjoining defendant Robert E. Keller and others acting in concert with him from arresting or threatening to arrest persons for exhibiting the movie "Cinderella-96."

[3] *Ga. Code Ann.* §26-2101(b) provides that material is obscene if:

"(1) to the average person, applying contemporary community standards, taken as a whole, it predominantly appeals to the prurient interest, that is a shameful or morbid interest in nudity, sex or excretion;

(2) the material taken as a whole, lacks serious literary, artistic, political or scientific value, and

(3) the material depicts or describes, in a patently offensive way,

had been shown at the Old Dixie Theater for a total of eleven days, on September 7, 1977, defendant Robert E. Keller, the Clayton County District Attorney, notified plaintiff's attorney that "the appropriate criminal prosecution" would be instituted if plaintiff continued to show the movie.[4] Faced with the choice between either intentionally subjecting its officers and employees to state criminal prosecution[5] under the Georgia obscenity statute

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sexual conduct specifically defined in subparagraphs (i) through (v) below:

(i) acts of sexual intercourse, heterosexual or homosexual, normal or perverted, actual or simulated;

(ii) acts of masturbation;

(iii) acts involving excretory functions or lewd exhibition of the genitals;

(iv) acts of bestiality or the fondling of sex organs of animals;

(v) sexual acts of flagellation, torture or other violence indicating a sadomasochistic sexual relationship;"

* * * * *

The Georgia statute substantially mirrors the guidelines contained in *Miller v. California*, 413 U.S. 15 (1973), and is not being attacked on its face.

[4] "I am writing this letter in response to your request as the attorney for Septum Twin Cinema that I notify you of any action contemplated by this office on the above referenced matter prior to taking such action.

"Since the movie Cinderella began showing in your theater, my office has been inundated with telephone calls in oposition (sic) to the showing of this movie. Members of my staff have viewed the movie and feel that there is sufficient probable cause that the movie violates the Georgia obscenity law under Georgia Code Annotated Section 26-2101.

"I can not prevent you from showing the movie but at your request I am notifying you that if the Septum Twin Cinema continues to show the movie, Cinderella, my office will institute the appropriate criminal prosecution."

The court notes that this letter by defendant was in response to a request by plaintiff's attorney.

[5] Mr. Robert B. Busman, president of the plaintiff corporation, states by affidavit that he feared arrest and prosecution of himself or his employees for exhibition of the movie "Cinderella-96" and, further, that his employees have refused to take any part in the operation of the Old Dixie Theater as long as they remain exposed to arrest and prosecution under the Georgia obscenity statute.

or suffering alleged irreparable harm[6] by foregoing what it believes to be constitutionally protected activity under the first and fourteenth amendments, on that date the plaintiff ceased exhibition of the movie and instituted this action for federal intervention under 42 U.S.C. § 1983.[7]

Plaintiff contends that its right to federal declaratory relief under these circumstances is mandated by the decision of the United States Supreme Court in *Steffel v. Thompson*, 415 U.S. 452 (1974). In that case the plaintiff was engaged in handbilling against American involvement in Vietnam at a shopping center and was twice warned by police that if he did not stop he would be arrested. The plaintiff in *Steffel* alleged that application of the Georgia criminal trespass law to him would violate his first and fourteenth amendment rights and, consequently, as in the case *sub judice*, brought an action under 42 U.S.C. § 1983 seeking declaratory and injunctive relief. After concluding that the plaintiff presented the court with an "actual controversy,"[8] a unanimous Court held

[6] Mr. Robert B. Busman, president of the plaintiff corporation, states by affidavit that lost promotional expenditures, lost revenues, and lost investment in viewing rights occasioned by suspending exhibition of the movie "Cinderella-96" causes irreparable injury to plaintiff in that a competitor of plaintiff is exhibiting the motion picture "Cinderella-96" at another location in the Atlanta metropolitan area, thus exhausting the market of persons who may desire to view "Cinderella-96." This court has been informed, however, that since the emergency hearing, on September 12, 1977, the office of the District Attorney in Fulton County, pursuant to a warrant issued by an independent magistrate, seized the film "Cinderella-96" at the Tower Place Six Theater at 3340 Peachtree Road in Fulton County and made two arrests.

[7] Specifically, plaintiff alleges that the actions of defendant, taken under color of *Ga. Code Ann.* §*26-2101*, are depriving the plaintiff of its constitutional rights to free expression under the first and fourteenth amendments.

[8] The district court had concluded that "the rudiments of an actual controversy between the parties" was lacking. *Becker v. Thompson*, 334 F.Supp. 1386 (N.D. Ga. 1971) (Henderson, J.).

that:

> *federal declaratory relief is not precluded* when no state prosecution is pending and a federal plaintiff demonstrates a genuine threat of enforcement of a disputed state criminal statute, whether an attack is made on the constitutionality of the statute on its face or as applied.

(Emphasis supplied.) 415 U.S. at 475. Thus, contrary to the plaintiff's contentions in the case *sub judice*, *Steffel* does not stand for the proposition that federal courts "should exercise their unquestioned jurisdictional authority"[9] whenever a potential state criminal defendant, faced with a genuine threat of arrest under a statute that is allegedly unconstitutional, either facially or as applied, seeks federal declaratory relief in an action under section 1983. Rather, *Steffel* merely holds that federal declaratory relief in such circumstances is not precluded because of any failure to exhaust state judicial or administrative remedies.[10]

Although this court is in agreement with the notion that both the potential state criminal defendant and the state itself, when confronted with a *Steffel* kind of situation, would benefit from a procedure which allows a declaration of rights without activation of the criminal process, the federal courts cannot be a vehicle for such a procedure in the absence of an "actual controversy" as required under the provisions of both the Federal Declara-

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[9] Plaintiff's reply brief (pages 3-4) states that "where a case falls within the foregoing progression such that state officials have stated that they intend to effect an arrest, but no proceeding has actually been initiated, then the Federal Courts should exercise their unquestioned jurisdictional authority," citing *Steffel*.

[10] 415 U.S. at 472-73.

tory Judgment Act [11] and Article III of the Constitution.[12] If the record reveals that the rudiments of an "actual controversy" are lacking, then this matter is not ,'justiciable." *See, e.g., Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227 (1937); *Guillot v. United States Department of Health, Education and Welfare*, 464 F.2d 598 (5th Cir. 1972). The statement in the affidavit of Mr. Robert B. Busman, president of the corporate plaintiff, that defendant's notification of his intent to prosecute resulted from "negotiations" between members of defendant's staff and agents of the plaintiff in a meeting held in defendant's office on September 6, 1977, strongly suggests collusion between the plaintiff and defendant.[13] In the court's view, this statement together with defendant's apparent promise to plaintiff not to prosecute for any exhibition of X-rated films prior to notification of an intent to do so, constitutes strong evidence of an implied, if not an ex-

[11] The Federal Declaratory Judgment Act, 28 U.S.C. § 2201, provides in pertinent part:

"In a case of actual controversy within its jurisdiction . . . any court of the United States may declare the rights and other legal relations of any interested party seeking such declaration . . . "

[12] Article III, Section 2 of the Constitution provides in part:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be, under their Authority; . . . to Controversies between . . . "

[13] At the emergency hearing Mr. Robert B. Busman testified that plaintiff's attorneys initiated the dialogue between plaintiff and defendant concerning plaintiff's exhibition of the movie "Cinderella-96" by asking defendant, prior to the exhibition of the movie, if he objected to such exhibition. In his affidavit Mr. Robert B. Busman stated:

"Defendant contacted the undersigned . . . to advise that complaints were being received regarding this movie . . . Further negotiations followed during which the Defendant and members of his staff viewed the picture in question and finally advised Plaintiff in a meeting held in the offices of the Clayton County District Attorney on Tuesday, September 6, 1977, that any further exhibition of the film would bring about criminal prosecution."

press agreement between the parties. This court holds that where the circumstances demonstrate that a potential criminal defendant has voluntarily [14] entered into and obtained an agreement with the prosecuting authorities under which such authorities promise not to prosecute under the obscenity laws prior to notification of an intent to do so, such a potential criminal defendant, by engaging in a collusory relationship with the prosecutors, in effect waives the right to declaratory relief through an action under section 1983, based on prior restraint under color of the obscenity statute.[15] If this court were to hold otherwise, by finessing such promises from state prosecutors, potential criminal defendants, without ever risking prosecution, would be assured of a federal "advisory opinion" every time the state prosecutors gave notice of their intent to prosecute, and the doors to the federal courthouse would be opened to countless numbers of section 1983 actions challenging application of state obscenity statutes to, conceivably, every new film or magazine that is suspect. The federal courts were not designed to act as a national censorship board. By holding that a potential criminal defendant who freely chooses to enter into such an arrangement with prosecuting authorities is himself foreclosing the possibility of an "actual controversy" between himself and the prosecutors for the duration of

[14] The fact that plaintiff initiated the dialogue with the defendant as to this particular movie indicates that plaintiff entered into an understanding or agreement with the defendant voluntarily and freely *as to its planned exhibition of this one movie, "Cinderella-96."* See notes 4 and 13 *supra.*

[15] This holding is limited to circumstances where the record demonstrates that prosecuting officials have acted in good faith, which includes compliance with this court's order in Penthouse International, Ltd. v. McAuliffe, Civil No. 77-1238A (N.D. Ga. Aug. 24, 1977) (Freeman, J.). The court concludes that this record is free from any evidence of bad faith or harassment of the plaintiff by officials from the office of the Clayton County District Attorney.

the collusion, and as to all matters that are the subject of it, this court is following the lead of several United States Supreme Court decisions which, in response to a recent flood of section 1983 litigants, have closed the floodgate under similar doctrines of jurisdiction and justiciability. *See Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26 (1976); *Rizzo v. Goode*, 423 U.S. 362 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975); *O'Shea v. Littleton*, 414 U.S. 488 (1974). Moreover, the United States Supreme Court has clearly sanctioned good faith private consultation between state prosecutors and those individuals who are potential criminal defendants under state obscenity statutes:

> We do not hold that law enforcement officers must renounce all informal contacts with persons suspected of violating valid laws prohibiting obscenity. Where such consultation is genuinely undertaken with the purpose of aiding (compliance) . . . with such laws and (to) avoid prosecution under them, it need not retard the full enjoyment of First Amendment freedoms.

Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963).

When a potential criminal defendant is able to extract a promise from prosecuting authorities not to prosecute prior to notification of an intent to do so, this court is hesitant to find that such notification is equivalent to what, in the absence of such an agreement, would be an arrest, thereby signaling the beginning of an "ongoing state criminal prosecution" and, therefore, federal court abstention under *Younger v. Harris*, 401 U.S. 37 (1971). This court does find, however, that when an agreement not to prosecute prior to notification is operative, upon such notification by prosecuting authorities, a sufficient state interest arises such that the appropriateness of fed-

eral intervention cannot be determined apart from the principles of federalism. In this regard, recent Supreme Court decisions also reflect a determination to keep section 1983 litigants out of the federal courthouse where they have an opportunity to have their rights vindicated in state court. See e.g., *Judice v. Vail*, 45 U.S.L.W. 4269 (U.S. Mar. 22, 1977); *Hicks v. Miranda*, 422 U.S. 332 (1975); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975).

The court does not specifically ground its decision today, however, on principles of jurisdiction and federalism under *Younger* and its progeny. This court merely finds that plaintiff's action does not present the court with a "justiciable controversy" in the constitutional sense. Therefore, for the above reasons, plaintiff's action is hereby dismissed.

IT IS SO ORDERED this 16th day of September, 1977.

/s/ WILLIAM C. O'KELLEY
WILLIAM C. O'KELLEY
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

SEPTUM, INC., a Georgia corporation vs. ROBERT E. KELLER, Individually and as District Attorney for Clayton County, Georgia	CIVIL NO. C77-1476A

ORDER

This civil action is before the court on the plaintiff's motion to alter or amend the judgment pursuant to rule 59(e) of the Federal Rules of Civil Procedure.

Apparently, the plaintiff in this action yet fails to understand the significant distinctions between the impasse he has encountered in the course of his consultation and collusion with the Clayton County prosecutors and the plight of the plaintiff in *Steffel v. Thompson*, 415 U.S. 452 (1974). At no time did the plaintiff or his colleagues in *Steffel* negotiate with either the police or the appropriate prosecuting authorities about the permissibility of leafleting on the sidewalk in front of the DeKalb County Shopping Center, and, quite clearly, no agreement to give notice of an intent to arrest or prosecute, prior to doing so, was ever sought or obtained by the plaintiff or his colleagues in *Steffel*. In fact, Steffel's colleague Becker was actually arrested under the Georgia criminal trespass statute for engaging in the leafleting in question. Upon being informed that the regulations of the DeKalb County Shopping Center prohibited distribution of leaflets on its property, Steffel and his colleagues did not even attempt to consult with the police about the cir-

cumstances in which they could safely leaflet at or near the shopping center so as to avoid arrest and prosecution for criminal trespass. In reviewing these distinctions, the court is not suggesting that there must have been an actual arrest of one in a posture identical to a prospective section 1983 plaintiff for such a prospective plaintiff to have standing to obtain declaratory relief, or that a potential criminal defendant jeopardizes his rights to section 1983 relief anytime he consults with prosecutors in an attempt to comply with the law. Rather, the court is demonstrating that with reference to the possible degrees of intercourse between prosecutors and potential criminal defendants, *Steffel* and the case *sub judice* represent two extremes along a hypothetical spectrum. In circumstances where consultation between a potential criminal defendant and prosecuting authorities, entered into voluntarily by the potential criminal defendant, rises to the level of a working agreement under which the so-called "threat" of arrest is merely the prosecutor's fulfillment of a bargained-for promise, this court reaffirms its holding that such a "threat" does not constitute the basis for a justiciable controversy in the constitutional sense.

Finally, although the court's decision in its order of September 16, 1977, was not specifically grounded on principles of jurisdiction and federalism under *Younger v. Harris*, 401 U.S. 37 (1971), the court did find that "when an agreement not to prosecute prior to notification is operative, upon such notification by prosecuting authorities, a sufficient state interest arises such that the appropriateness of federal intervention cannot be determined apart from the principles of federalism." The plaintiff has attacked this finding by the court as introducing an unwarranted departure from a clear line of demarcation for

the applicability of *Younger* principles at the point where proceedings are actually pending in state court and as introducing an unworkable and vague notice of "state interest." While the court reiterates today that its discussion in the order of September 16, 1977, regarding the applicability of principles of federalism and abstention under *Younger* was mere dictum, in this court's view a "state interest" analysis is not only workable but also is a more enlightened approach to application of the principles of federalism embodied in *Younger*. Moreover, this court emphasizes that the United States Supreme Court has taken a similar approach in defining when a sufficient "federal interest" becomes vested. In *Hicks v. Miranda*, 422 U.S. 332 (1974), the Court departed from the traditional demarcation at the point when proceedings are pending and held:

> that where state criminal proceedings are begun against federal plaintiffs *after the* federal *complaint is filed but before* any *proceedings of substance on the merits* have taken place in the federal court, the principles of *Younger v. Harris* should apply in full force.

(Emphasis added.)

Therefore, for the above reasons, and in accordance with the court's discussion in its order of September 16, 1977, the plaintiff's motion is hereby denied.

IT IS SO ORDERED this 14th day of November, 1977.

/s/ WILLIAM C. O'KELLEY

WILLIAM C. O'KELLEY
United States District Judge

APPENDIX C

SEPTUM, INC., a Georgia Corporation,
Plaintiff-Appellant,

V.

ROBERT E. KELLER, Individually and as District Attorney for Clayton County, State of Georgia,
Defendant-Appellee.

No. 78-1141.

United States Court of Appeals, Fifth Circuit.

March 24, 1980.

Appeal from the United States District Court for the Northern District of Georgia.

Before BROWN, HILL and RANDALL, Circuit Judges.

RANDALL, Circuit Judge:

This action was brought in the United States District Court for the Northern District of Georgia by Septum, Inc. (Septum), a Georgia corporation engaged in the business of exhibiting motion pictures, against Robert E. Keller, individually and as District Attorney for Clayton County in the State of Georgia (the County). Septum sought injunctive and declaratory relief [1] from the County's threatened enforcement of the Georgia obscenity

[1] Septum's Complaint seeks both a preliminary and a permanent injunction, enjoining the County from enforcing or threatening to enforce the Georgia obscenity statute, Ga. Code Ann. § 26-2101 (1978), with respect to the movie "Cinderella." The Complaint also seeks a declaration that "Cinderella" is not obscene within the meaning of *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), and the Georgia obscenity statute; and that the application of that statute to Septum's operations is a violation of the rights secured to it under the first and fourteenth amendments.

statute, Ga. Code Ann. § 26-201 (1978),[2] claiming that enforcement of the statute against it infringed rights secured to it under the first amendment, in violation of 42 U.S.C. § 1983 (1976).[3] The basis for the threatened prosecution was Septum's exhibition of an X-rated motion

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Ga. Code Ann. § 26-2101 (b) (1978) provides:

(b) Material is obscene if:

(1) to the average person, applying contemporary community standards, taken as a whole, it predominantly appeals to the prurient interest, that is a shameful or morbid interest in nudity, sex or excretion;

(2) the material taken as a whole, lacks serious literary, artistic, political or scientific value, and

(3) the material depicts or describes, in a patently offensive way, sexual conduct specifically defined in subparagraphs (i) through (v) below:

(i) acts of sexual intercourse, heterosexual or homosexual, normal or perverted, actual or simulated;

(ii) acts of masturbation;

(iii) acts involving excretory functions or lewd exhibition of the genitals;

(iv) acts of bestiality or the fondling of sex organs of animals;

(v) sexual acts of flagellation, torture or other violence indicating a sadomasochistic sexual relationship. . . .

[3] 42 U.S.C. § 1983 (1976) provides:

Every person who, under color of any Statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. Jurisdiction is based on § 1983 and on 28 U.S.C. § 1343 (1976). The latter statute provides, in pertinent part:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

picture entitled "Cinderella," a film loosely based on the well-known fairy tale and evidently incorporating some sexually explicit symbolism not found in the original.

The events leading up to this litigation are important. In December 1975 three Septum employees were arrested at one of Septum's theaters, the Old Dixie Twin Cinema in Clayton County, and were charged with exhibiting obscene material in violation of the Georgia obscenity statute. According to the affidavit of Robert B. Busman, Septum's president, charges were dropped against the three employees in return for Septum's agreement to stop showing X-rated films in Clayton County. In March 1977, apparently in an attempt to avoid the embarrassment that would attend another obscenity arrest, Septum entered into an informal arrangement with the Clayton County District Attorney regarding the future exhibition of X-rated films. The apparent terms of this arrangement included the District Attorney's agreement to issue a warning to Septum in the event the County intended to proceed with obscenity arrests and prosecutions against the theater because of an allegedly obscene movie. Septum submits that the purpose of the arrangement was to give the theater the option of withdrawing the film voluntarily rather than forcing the County to prosecute to suppress it. According to Mr. Busman's affidavit this procedure was followed in May 1977 with respect to a film entitled "Kinky Ladies of Bourbon Street." The Clayton County District Attorney apparently indicated that he would initiate a prosecution if Septum continued to exhibit the film; as a result, Septum discontinued showing the movie.

The scenario underlying the present litigation began

September 6, 1977. Septum had been showing the movie "Cinderella" at the Old Dixie theater in Clayton County since August 26, 1977, and the District Attorney's office had received over 200 phone calls complaining about it. The District Attorney determined that he would have to view the movie to decide whether a criminal prosecution should be initiated. Thereafter, at Septum's request, a conference was held between Mr. Busman and his attorneys and members of the District Attorney's office on September 6, 1977. At that time the District Attorney informed Septum's representative that if Septum continued to show the movie, he would initiate criminal prosecution. At the request of Septum's attorney, the District Attorney prepared a letter containing substantially the same statement of intent as had previously been conveyed.[4] Septum stopped showing the film and on September 7, 1977 filed this suit in federal district Court.

The district court declined to accept jurisdiction of the complaint after a full hearing on the merits, holding that there was no "actual controversy" as required by Article III of the United States Constitution and the Federal

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[4] The letter to Septum's attorney, signed by defendant Robert Keller as District Attorney for Clayton County, reads as follows:

Dear Foy:

I am writing this letter in response to your request as the attorney for Septum Twin Cinema that I notify you of any action contemplated by this office on the above referenced matter prior to taking such action.

Since the movie Cinderella began showing in your theater, my office has been inundated with telephone calls in oposition (sic) to the showing of this movie. Members of my staff have viewed the movie and feel that there is sufficient probable cause that the movie violates the Georgia obscenity law under Georgia Code Annotated Section 26-2101.

I can not prevent you from showing the movie but at your request I am notifying you that if the Septum Twin Cinema continues to show the movie, Cinderella, my office will institute the appropriate criminal prosecution.

Declaratory Judgment Act, 28 U.S.C. § 2201 (1976).[5] The Court said:

> This Court holds that where the circumstances demonstrate that a potential criminal defendant has voluntarily entered into and obtained an agreement with the prosecuting authorities under which such authorities promise not to prosecute under the obscenity laws prior to notification of an intent to do so, such a potential criminal defendant, by engaging in a collusory relationship with the prosecutors, in effect waives the right to declaratory relief through an action under § 1983, based on prior restraint under the color of the obscenity statute.

Although the district court purported to base its decision exclusively on the issue of justiciability, and explicitly disavowed an intention to rule on the question of abstention under *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) and its progeny, the *Younger* issue is properly before this Court for review. The issue is certain to arise on remand if it is not dealt with here. Despite the district court's reservations, the court erroneously construed the import of *Steffel v. Thompson*, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974), which governs the resolution of the *Younger* abstention issue here, and in doing so effectively decided the question. The issue was presented below by the County, the parties fully explored the issue in their briefs and at oral argument, and the district court made a ruling concerning this central issue. Therefore, the question whether the federal district court should abstain under the principles of *Younger v. Harris* and subsequent cases elaborating and

[1] Article III provides, in pertinent part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution . . . " U. S. Const. Art. III § 2. Federal declaratory judgments are permitted under 28 U.S.C. § 2201 (1976), which limits the availability of that remedy to "a case of actual controversy."

refining those principles is now appropriately before this court.

I.

(1, 2) We address first, and briefly, the County's contention that no case or controversy within the meaning of Article III of the Constitution and the Federal Declaratory Judgment Act, 28 U.S.C. § 2201 (1976), can be discerned in this case. This position, which is difficult to understand in view of the unconstroverted evidence establishing Septum's desire to exhibit "Cinderella" at its theater in Clayton County and the County's intention to prosecute if it does so, is apparantly based on the novel theory that not only must the parties' legal interests be adverse, but there must be personal animosity between them as well.[6] The County's apprehension of the nature of the controversy required by Article III is mistaken. Both parties to this litigation made an effort to accommodate the private and public interests involved in this kind of situation without resort to the State's criminal process. When the parties to such an agreement reach an impasse in negotiation, however, for us to hold that any controversy evaporates under the light of the previous cooperative relationship between them would effectively eliminate the incentive for private parties to participate in this kind of arrangement. More importantly, however,

[6] The gist of the County's argument is conveyed in the following extract from its brief:

> The history of the involvement between Septum, Inc., its attorneys, and representatives of the Clayton County District Attorney discloses a relationship which falls far short of the Article III "Controversy", the existence of which is a condition precedent to the invocation of federal jurisdiction. Rather than a "concrete adverseness" . . . there was, an atmosphere of co-operation and negotiations all at the behest of Septum, Inc.

Brief of Appellee at 5 (emphasis in original).

personal animosity between the parties to a lawsuit has never been considered a necessary aspect of a controversy under Article III or the Federal Declaratory Judgment Act. All that is required is that "(t)he controversy . . . be definite and concrete, touching the legal relations of parties having adverse legal interests." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240, 57 S.Ct. 461, 464, 81L.Ed 617 (1937) (emphasis added). The county believes "Cinderella" is obscene; Septum does not. In the circumstances of this case, that is sufficient. (3) That no criminal prosecution has been instituted against Septum does not affect the existence of a controversy, for federal courts are not hostile to anticipatory constitutional challenges to statutes. Such challenges "play a most vital role in modern efforts to enforce constitutional rights." *International Soc. for Krishna Consciousness v. Eaves*, 601 F.2d 809, 817 (5th Cir. 1979). When a plaintiff alleges an intention to engage in conduct arguably affected with a constitutional interest, but proscribed by statute, and there exists a credible threat of prosecution thereunder, he "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Doe v. Bolton*, 410 U.S. 179, 188, 93 S.Ct. 739, 745, 35 L.Ed.2d. 201 (1973); See *Babbit v. UFW*, _____ U.S. _____, 99 S.Ct. 2301, 2308, 60 L.Ed.2d 895 (1979); *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S.Ct. 1209, 1215, 39 L.Ed.2d. 505 (1974); *Evers v. Dwyer*, 358 U.S. 202, 204, 79 S.Ct. 178, 179, 3 L.Ed.2d. 222 (1958). The controversy between Septum and the County satisfies all the foregoing controversy sufficient to permit the exercise of the judicial power of the United States is presented here.

II.

The district court concluded that the pre-enforcement notification agreement that operated here raised a significant question about the appropriateness of "federal intervention" when the case was viewed in the light of the principles of *Younger v. Harris* and its progeny. We note at the outset two important characteristics of the case before us. First, there is no question of federal intervention as such, unless any federal constitutional challenge to a state statute asserted in a federal court amounts to federal intervention in the affairs of the state. There is no state proceeding, criminal or equitable, in progress at the moment; nor will there be one unless Septum chooses either to seek equitable relief in a state court or to subject itself to criminal prosecution by exhibiting "Cinderella" without obtaining a judicial declaration of its right to do so. Second, since Septum has indicated that it will not expose itself to the risk of a criminal prosecution by exhibiting "Cinderella," we can be certain that this case does not present a choice between a remedy at law and one in equity. Instead, the only question is whether a plaintiff who has negotiated an agreement with state prosecuting authorities for pre-enforcement notification can, consistent with the notions of federalism, equity and comity embraced in the *Younger* line of cases, obtain equitable relief in a federal forum upon applying to the federal court in the first instance.

"Our Federalism" was the basis in *Younger* for holding that federal injunction relief is not normally available to halt a state criminal prosecution.[7] Two years later, in *Steffel v. Thompson*, 415 U.S. 452, 94 S.Ct. 1209, 39

[7] See *Younger v. Harris*, 401, U.S. 37, 43-54, 91 S.Ct. 746, 750-755, 27L.Ed.2d 669 (1971).

L.Ed.2d 505 (1974), the Court emphasized that "the relevant principles of equity, comity, and federalism 'have little force in the absence of a pending state proceeding.' " Id. at 462, 94 S.Ct. at 1217, quoting *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 509, 92 S.Ct. 1749, 1756, 32 L.Ed.2d. 257 (1972). The principle that a court should not inject equity when there is an adequate remedy at law seems to have no application to this case, since the choice is only between a state or a federal forum to hear a prayer for equitable relief. Moreover, because the federal court in this situation is not asked to interrupt or intervene in an ongoing, or imminent, state proceeding, notions of federalism—at least insofar as that term calls to mind the fact that state and federal courts exist side by side and exercise concurrent jurisdiction over a case like this one—seems just as inapposite. This plaintiff's choice of a federal forum involves no more interference with Georgia's orderly administration of its own affairs than is attendant upon any § 1983 challenge to state laws. Nevertheless, arguably the "more vital consideration"[8] of comity counsels federal restraint when the plantiff's vertifiable allegations of a threat of enforcement arise out of the kind of pre-enforcement notification agreement underlying this case. We note that the plaintiff's prior negotiation with prosecuting authorities is the only element distinguishing this case from *Steffel v. Thompson*,[9]

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[8] See *Trainor v. Hernandez*, 431 U.S. 434, 443, 97 S.Ct. 1911, 1917, 52 L.Ed2d 486 (1977); *Judice v. Vail*, 430 U. S. 327, 334, 97 S.Ct. 1211, 1216, 51 L.Ed2d 376 (1977); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 601, 95 S.Ct. 1200, 1206, 43 L.Ed2d 482 (1975); *Younger v. Harris*, 401 U.S. 37, 44, 91 S.Ct. 746, 750, 27 L.Ed2d 669 (1971).

[9] *Steffel* involved the threatened enforcement of Georgia's criminal trespass statute against one who was distributing handbills on a sidewalk surrounding a shopping center. According to the stipulated facts of the appeal, Steffel was warned on two different days by

in which the Court held that abstaining from exercising jurisdiction over Steffel's § 1983 challenge to a Georgia statute was improper when the plaintiff was threatened with prosecution but could not be prosecuted unless he violated the statute another time. With regard to the concurrent availability of declaratory relief in the state courts of Georgia, which was permitted at that time, as it is now, see Ga. Code Ann. § 110-1101 (1972), the Court noted: "(We) do not require petitioner first to seek vindication of his federal rights in a state declaratory judgment action, see *Lake Carriers' Assn. v. MacMullan*, 406 U.S. at 510, 92 S.Ct. 1949, at 1757; *Wisconsin v. Constantineau*, 400 U.S. 433,(91 S.Ct. 507- 27 L.Ed.2d 515) (1971) . . . ." 415 U.S. at 475, N. 22, 94 S.Ct. at 1224, n 22. The County's uncoerced agreement to notify Septum of its intent to prosecute if Septum continued to exhibit an allegedly obscene movie does not alter the analysis. The agreement was negotiated at arms' length and benefited both parties. Septum guarded itself to a degree against the risk of criminal prosecution, and the County profited in being able to conserve, to an extent, its prosecutorial resources. The quid pro quo of the agreement did not

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police that he would be arrested if he did not depart. 415 U. S. at 455-56, 94 S.Ct. at 1213-14. In addition, Steffel testified that several months earlier police officers had delivered a similar warning. ID. at 455 n. 2, 94 S.Ct. at 1214 n. 2. The Georgia statute, Ga. Code Ann. § 26-1503 (1972), requires a single notice to depart from the owner or rightful occupant of the property, but none from law enforcement authorities. Thus the distinction between Steffel's case and Septum's is not that pre-enforcement authorities. Thus the distinction between Steffel's case and Septum's is not that pre-enforcement notification was delivered to Septum when none was required, but only that in Septum's case it was delivered at Septum's request, whereas in Steffel's case it was delivered gratuitously. As we discuss infra, the agreement to warn Septum of a contemplated prosecution was designed to benefit all concerned.

include any provision limiting the availability, to Septum, of federal relief.

The proposition that federal courts should impose such a limitation as a matter of law based on the vague motion of comity finds no support in previous *Younger*-type cases, and would run directly contrary to the policies the Supreme Court has identified underlying § 1983. In *Lake Carriers' Ass'n v. MacMullan*, supra, the Court said: "(T)he availability of declaratory relief in (a state court) on appellants' federal claims is wholly beside the point." ID 406 U.S. at 510, 92 S.Ct. at 1757. In reaching this conclusion the Court relied on the following apposite language from *Zwickler v. Koota*, 389 U.S. 241, 248, 88 S.Ct. 391, 395, 19 L.Ed.2d 444 (1967):

In thus (establishing jurisdiction for the exercise of) federal judicial power, Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of its federal constitutional claims. Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility, equally with the federal courts, ". . . to guard, enforce, and protect every right granted or secured by the Constitution of the United States . . . ," *Robb v. Connolly*, 111 U.S. 624, 637, 4 S.Ct. 544, 551, 28 L.Ed. 542.

Moreover, allowing the district court to abstain from exercising jurisdiction over this case would do violence to the Supreme Court's holding in *Steffel*. Concerning the applicability of *Steffel*, the district court quoted the following language from that case:

> . . . . federal declaratory relief is not precluded when no state prosecution is pending and a federal plaintiff demonstrates a genuine threat of enforcement of a disputed state criminal statute, whether an attack is

> made on the constitutionality of the statute on its face or as applied.

415 U.S. at 475, 94 S.Ct. at 1223-1224. The court reasoned that although federal declaratory relief is not precluded, neither is a federal forum for the complaint required. This was error. In *Steffel* the Supreme Court reversed the Fifth Circuit's determination that abstention was proper under the principles announced in *Younger* and in *Samuels v. Mackell*, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971), and remanded. Plainly the disposition of that case precludes discretionary abstention in this one, since there is no factual distinction between the cases relevant to the abstention issue.

Accordingly, we hold that abstention is inappropriate in this case. We reverse and remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

JAMES C. HILL, Circuit Judge, specially concurring:

I concur, but add these observations. The result we find to be required in this case may well bring to an end cooperative undertakings between potential adversaries in situations like the one reviewed here.

If a prosecuting attorney prefers that he not be forced to try his cases in federal court, often sitting many miles away from the state court having jurisdiction, he would be well advised to refrain from conciliatory measures which might warn his adversary of intention to bring criminal proceedings. Septum, in this case, professes to have wanted an opportunity to consider substituting a film for the allegedly offensive one and, on that profession, negotiated a "notice" arrangement with the district attorney. We now announce that by making this agree-

ment Septum brought itself within the *Younger* "window": A point lying between the time when a real and substantial threat of prosecution arises and the time when state criminal proceedings are commenced.

Justice Stewart observed in *Steffel v. Thompson*, 415 U. S. 452, 94 S.Ct. 1209, 1224, 39 L.Ed2d 505 (1974) (Stewart, J., concurring): "Cases where such a 'genuine threat' can be demonstrated will, I think, be exceedingly rare." Perhaps their rarity will be governed by the willingness of the state's attorney to work constructively with potential violators. Such cases will be rare, indeed, where the state refuses to be helpful; to secure state court jurisdiction, it must institute criminal proceedings by surprise.

Perhaps parties yet bent upon constructive cooperation can devise a way to implement that good impulse without transferring potential cases from state courts to federal courts. I do not believe that what we say today is intended to discourage their trying.

JOHN R. BROWN, Circuit Judge, concurring in part and dissenting in part:

The issue which faces us today is one which places upon the equitable considerations enunciated in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed2d 669 (1970), the most strenuous challenge I believe they have yet undergone. We must decide whether a plaintiff, requesting declaratory and injunctive relief against a State District Attorney, may take advantage of an artificial set of circumstances, created through the construction of an agreement it entered into with its potential prosecutor, to bring an action which would otherwise clearly have been precluded by 28 U.S.C.A. § 2283 and *Younger*.

This agreement wards off indefinitely any actual prose-

cution by the District Attorney's office, thereby dispelling the likelihood of a "pending prosecution" which would automatically force the Federal Court to refrain from exercising its jurisdiction. Yet at the same time, this agreement hovers as a threat of prosecution, not merely "imaginary and speculative," but substantial enough to create a justiciable issue for the Federal Courts to decide. Thus, Judge Randall finds the plaintiff balancing nicely on the sill of the "*Steffel* window" with a set of circumstances similar, although not identical, to those of *Steffel v. Thompson*, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed2d 505 (1971) in which the Supreme Court held the *Younger* abstention doctrine inapplicable.

I agree with Judge Randall that a justiciable controversy exists in this case. But I dissent from her analysis of the *Younger* abstention question. I believe it is an over simplification of the case to say that just because there is technically no pending prosecution in State Court, that there is no question of Federal intervention in the affairs of the State, and that the case is therefore controlled by *Steffel*. Nor do I agree with her statement that since Septum does not intend to risk criminal prosecution by showing "Cinderella," there is no choice between law and equity at issue here.

Both of these conclusions can be made only if one ignores the fact that, had there not been an agreement by the District Attorney to warn Septum before making arrests under the obscenity statute, there would have been a criminal prosecution pending, and the Federal District Court would have had no choice but to abstain from hearing the case. To ignore the fact that the "*Steffel* window" in this set of circumstances was created artificially through an agreement between the parties is to ignore the equitable considerations which are the first

and foremost reason that *Younger* abstention came into being. I believe this one fact requires us to reconsider the *Younger* equitable principles, to distinguish this case from *Steffel,* and to affirm.

I. EQUITY

Although the procedural distinction between actions at law and actions at equity has disappeared in Federal District Courts, F.R.Civ.P. 1, suits for injunctions and for declaratory relief, both traditionally brought as equitable actions (see D. Dobbs, Remedies 25-26 (1973)) (are still governed by the previously established substantive principles of equity. C. Wright, Law of Federal Courts, 318 (3d ed. 1976); 30 C.J.S. *Equity* § 6 (1965).

The most basic principle of equity is the discretion of the Court. Historically, equitable remedies were granted only in cases where an action at law would not provide adequate relief. *Dobbs,* supra, at 33, 57. The remedy granted by a Court sitting in equity was based on its "sense of need and justice." Id. at 25.

Traditionally, injunctions would issue when, not only did the remedy at law fail to meet the adequacy test, but the damage to the plaintiff if he were forced to settle for only a legal remedy, would be irreparable. Id. at 108. Plaintiffs in equity often sought declaratory judgments along with injunctions in order to obtain a formal declaration of their rights with respect to an existing conflict or one that was fairly certain to arise in the future. Id. at 26.

II. ABSTENTION

Federal injunctions against State Court proceedings are governed by 28 U.S.C.A. § 2283 which is the starting point for the *Younger* abstention doctrine. This statute

provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of the Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

It is based on the same law of equity common to all injunctions. Its purpose is "to prevent needless friction between state and federal courts." *Oklahoma Packing Co. v. Oklahoma Gas and Electric Co.*, 309 U. S. 4, 9, 60 S. Ct. 215, 218 84 L.Ed. 447, 537 (1940). The notions of federalism and comity which underlie § 2283 and which were developed so extensively in *Younger* are actually founded in equity. Abstention itself is an equitable principle that has developed in Federal Court. 30 C.J.S. *Equity* § 10.

Although it is in the form of law, § 2283, is the codification of the equitable rule governing availability of the injunctive remedy. Normally a Federal Court may not enjoin a state proceeding because it is assumed the state proceeding will provide an adequate remedy at law, that is, it will adequately adjudicate the would-be Federal plaintiff's rights under Federal law and the Constitution.

The three exceptions enunciated in the statute are fundamentally codifications of three situations in which a Federal injunction should issue because it has been Congressionally determined that the remedy under state law would be inadequate. *Younger* refines the requirements for the application of the § 2283 exceptions in its holding that, to enjoin a pending state prosecution, not only must the remedy at law be inadequate, but there must be a "showing of bad faith, harassment, or any other unusual circumstances that would call for equitable relief." *Younger*, supra, 401 U.S. at 54, 91 S.Ct. at 755, 27 L.Ed2d at 681. Essentially this means the plaintiff also must show

severe, irreparable harm in order to get a state proceeding enjoined.

Of course, § 2283 applies only to injunctions, but declaratory judgments are not that different a matter. Although *Steffel* discusses at length the differences between injunctive and declaratory relief, this was only with respect to a situation where there was no pending state criminal prosecution. In such a case, even an injunction could issue. *Doran v. Salem Inn, Inc.*, 422 U. S. 922, 930-31, 95 S.Ct. 2561, 2567-68, 45 L.Ed2d 648, 658-59 (1975). *Samuels v. Mackell*, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1970), a companion case to *Younger*, states the applicable rule for Federal declaratory relief after a state proceeding has begun. In most cases it will not be granted if an injunction would not be appropriate either.

I dissent because I feel the same deference to equitable principles which permeates § 2283, *Younger*, and the entire abstention doctrine should be practiced when we consider the specific facts of this case. When a Court sits in equity it must apply all relevant canons of substantive equity. Thus, in this case we cannot ignore the theory of estoppel. See *Dobbs*, supra at 41-43. Septum obtained a promise from the District Attorney that he would forego prosecution until Septum was fully warned of his intent to do so. Essentially, the State was giving up its right to prosecute in State Court to accommodate Septum. The would-be criminal defendant took advantage of the good faith of the District Attorney in order to sue in Federal Court.

The District Court characterized Septum's actions as a waiver of its right to claim there was a justiciable issue. Although this is not quite accurate, I can see that the District Court was trying to achieve the same equities

that I adhere to. Septum should be estopped from obtaining an advantage it would not otherwise have had. But for this agreement, Septum would have been involved in a criminal prosecution, brought in good faith, with no hint of the purpose of harassment. *Younger*, specifically holds that neither "the cost, anxiety, and inconvenience" of defending a criminal prosecution, nor the "chilling" of First Amendment rights constitutes the type of irreparable injury necessary to enjoin a state action. 401 U.S. at 46, 50, 91 S.Ct. at 751, 753, 27 L.Ed.2d at 676-77, 679. Moreover, we have every reason to believe this proceeding would have fairly adjudicated Septum's rights. The equities of this case demand that we treat it as if there were a pending prosecution and as if *Younger* and *Samuels* applied to require Federal abstention.